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IN THE

Supreme Court of the United States

842445
U. S. Sup. Ct.

October Term, 1948
No. 519

BIRCH SECURITIES COMPANY,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the District Court of Appeal, Third Appellate District, the State of California, and Brief in Support Thereof.

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BIRCH SECURITIES COMPANY,

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PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the District Court of Appeal, Third Appellate District, the State of California.

To the Honorable the Supreme Court of the United States:

The petitioner, Birch Securities Company, a Nevada Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Third Appellate District, of the State of California, entered July 12, 1948 [R. 111] (86 Advance California Appellate Reports, 732, 196 P. 2d 143), affirming a judgment of the Superior Court of the State of California, in and for the County of Sacramento. [R. 30.]

Statement of Matter Involved.

The fact that petitioner set up and presented in the present action in the District Court of Appeal of the State of California, hereinafter referred to as the state court, a right claimed under authority of the United States under and by virtue of the judgment of a three-judge United States District Court and that the state court considered the federal question thus presented and ruled adversely thereon, appears from the opinion of the state court which is set forth commencing at R. 111. That portion of such opinion which is pertinent under this heading is as follows:

> "The complaint (in the present action) alleges that the defendant (a Nevada corporation) conducted business in California during the years of 1935 and 1936, for pecuniary profit, as defined by section 5 of the act (the Bank and Corporation Franchise Tax Act, 3 Deering Gen. Laws, p. 3010, Act 8488), and that, after examination of defendant's reports and records of transactions of said two years, the Franchise Tax Commissioner ascertained the net income and additional franchise taxes due therefor, together with interest and penalties provided for by the act, and assessed additional taxes in the amounts specified in the complaint; that said assessments and demands were served by mailing them to the address furnished upon defendant's filed reports, with the postage prepaid, as required by the tax act; that the defendant failed to protest said levy within 60 days thereafter, or at all, and that no part of said additional assessments was paid * * *. [R. 112.]
>
> "The answer denies the material allegations of the complaint, and affirmatively alleges that the defendant is a mere holding corporation and was not engaged in business in California for pecuniary profit;

that the defendant did not receive said notices of assessments of additional taxes, and that the plaintiff, State of California, is estopped from maintaining this action by a judgment which was rendered in the United States District Court of Southern California, in February, 1941, in an action entitled, A. Otis Birch v. Charles J. McColgan, as Franchise Tax Commissioner, et al., which became and is res judicata of the issues of this cause. [R. 113.]

"The trial court found that the defendant was engaged in business in California for pecuniary profit during said two years and derived the net profits correctly stated in the Franchise Tax Commissioner's return and levy of assessments for additional taxes upon which said taxes were computed, as stated in the complaint, no part of which was paid; * * * [R. 113.]

"Judgment was thereupon rendered against the defendant for the additional franchise taxes, together with interest and penalties, as prayed for in the complaint. From that judgment this appeal was perfected." [R. 113.]

* * * * * * * *

"The appellant is mistaken in assuming that the court failed to find upon the issue of the alleged estoppel of the former federal judgment in the case of A. Otis Birch v. Charles J. McColgan, as Franchise Tax Commissioner. Finding number XII specifically determines that the former judgment 'is not res judicata in this action and does not constitute an estoppel. Said judgment did not adjudicate the issues of this action. The cause of action involved in said federal court proceeding was not the same as the causes of action here involved. The parties in said federal court proceeding were not the same as the parties to

this action.' Plaintiff's objection to the introduction of the record in the federal case was therefor properly sustained. The printed record of that former case is presented to this court as an appendix to appellant's brief.

"The chief issue on this appeal is the question as to whether the federal judgment is res judicata of the issues of this suit. We are of the opinion the trial court correctly held that it is not res judicata of the essential issues of this case. The State of California was not a party to that suit." [R. 118.]

The printed record, referred to in the above quoted opinion, consists of instruments which were attached as Exhibits "A," "B" and "C" to this petitioner's Answer to the Amended Complaint in the present action, the genuineness and due execution of which was undenied. These instruments are set forth commencing at R. 139, 140 and 166.

Exhibit "A" consists of a stipulation between A. Otis Birch, as a shareholder acting in this petitioner's behalf, against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, and others, in the aforesaid federal action, stipulating that findings of fact and conclusions of law might be therein made based upon the allegations of the plaintiff's complaint therein, and that final judgment might be entered thereon in this petitioner's favor and against said defendants "the same as if said defendants had defaulted at the trial of such federal action *on the merits* and the same as if the plaintiff had introduced evidence in support of each of such allegations, provided however, that the relief granted shall be in conformity with the opinion of the court" theretofore filed in such federal action. [R. 139.] (Emphasis added.)

The opinion, referred to in the aforesaid stipulation, is an opinion by Mr. Justice Mathews of the three-judge federal court. It appears in 39 Fed. Supp. 358, and is set forth as an Appendix hereto attached. For the purposes of the motion to dismiss it assumed each of the allegations of the complaint in the federal action to be true. It held this petitioner not entitled to enjoin the collection of the tax but that it was entitled to enjoin the Commissioner from maintaining any suspension of petitioner's charter, or from threatening to prosecute it by reason of such suspension, upon the assumption that each allegation of the plaintiff's complaint in the federal action is true, including the allegations that this petitioner never has done business in California within the meaning of the Franchise Tax Act; that the assessment involved in the within action was therefore wrongfully made; and that the within action is wholly without foundation and prematurely brought in that the notices which were mailed in the manner provided by the act are void for want of due process. [Complaint, R. 140 to R. 166.] (Append. 1 to end.)

Exhibit "B," above referred to consists of the allegations of said complaint in the federal action. [R. 140.]

Exhibit "C," above referred to, consists of the findings of fact, made pursuant to the aforesaid stipulation, finding each and every allegation of said complaint to be true, except as to two paragraphs not material to this proceeding. [R. 166.]

In other words, after the three-judge federal court filed its opinion, based upon the assumption that each of the allegations of the plaintiff's complaint were true, Commissioner McColgan stipulated that the three-judge court might find each of such allegations to be true. The allega-

tions of the complaint and therefore the findings of fact [R. 166] are as follows:

This petitioner is a Nevada corporation. [R. 140, 142.]

The amount of the tax involved is in excess of $3,000.

"XIV.

"The said defendant, Birch Securities Company, ever since its organization has been and now is neither a financial, mercantile nor manufacturing corporation and has not been and is not now a business corporation and said defendant *has not done, and is not doing, any business within the meaning of the Act* and of section 16 of Article XIII of the Constitution of the State of California and said corporation has never actively engaged, or at all, in any transaction for the purpose of financial or pecuniary gain or profit within the limits of the State of California, or at all, and [fol. 148] said corporation has never engaged in any activities other than as aforesaid and said corporation has never done any business within the limits of the State of California." [R. 145.] (Emphasis added.)

"XXIV.

"The plaintiff is informed and believes and upon such ground alleges, *that ignoring the fact that the corporation did not do any business in California* within the meaning of the Act, the Commissioner thereupon *wrongfully* used [fol. 153] said return as a basis for computing of the franchise tax of the corporation for both the year ending September 30, 1935, and for the year ending September 30, 1936, and that the Commissioner claims to have mailed to the corporation on December 10, 1936, a purported Notice of Additional Franchise Tax Proposed to be Assessed for both of said fiscal years in the total sum of $6361.14, thereby purporting to raise the tax for

said fiscal years in the full amount of said sum. The said alleged notice was never received by the corporation, or any of its officers or authorized agents, at any time prior to August 23, 1938, and said purported tax was never protested by the corporation and the defendant state officers claim said tax to be and have been final ever since prior to Feb. 1st, 1937. [R. 149.] (Emphasis added.)

"XXXI.

"On August 23, 1938, the Commissioner caused an action to be commenced by the defendant, Attorney General, in the superior court of the State of California, in and for the county of Sacramento, entitled The People of the State of California vs. Birch Securities Company, a corporation, and being cause No. 58345, of said court. A copy of the Complaint in said action (the present action) is hereto attached marked Exhibit "B" and by reference made a part hereof. In said action the plaintiff seeks a judgment *in personam* against the defendant corporation and in two causes of action for taxes based on each of said purported assessments and based upon, and only upon, the purported mailing of the aforesaid Notices of Additional Franchise Tax Proposed [fol. 156] to be Assessed in the said sums of $6361.14, and $1137.63, respectively. * * *" [R. 149.]

"XXX.

"That valid service of any Notice of Additional Franchise Tax Proposed to be Assessed is a condition precedent to the validity of any purported additional assessments or to the validity of any taxes based thereon and constitutes a necessary and jurisdictional foundation for the commencement of any suit for the collection of such purported taxes. *That any action for the collection of said purported taxes*

based upon said invalid service of process would be prematurely brought and wholly without foundation." [R. 151.] (Emphasis added.)

Pursuant to the stipulation, the three-judge federal court further found that the aforesaid notices are invalid and that therefore the present action is prematurely brought and wholly without foundation, in that such notices, and such Franchise Tax Act, in so far as it provides for such notices, constitute an attempt to take this petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. [R. 141, 142, 143, and 147.]

The aforesaid finding of fact as to the unconstitutionality of the said Franchise Act is material to the within proceeding only in so far as it constitutes a basis of the federal court's finding and determination that the present action is prematurely brought and without the requisite jurisdictional foundation.

The federal court judgment which is based upon the aforesaid stipulation and findings of fact is set forth at R. 105. Its recitals refer to the aforesaid opinion of the federal court and to the aforesaid stipulation and findings of fact. [R. 108.] After the filing of this judgment the said McColgan filed his Amended Complaint in the present proceeding [R. 1] and this petitioner filed its Answer to such Amended Complaint setting up such federal court judgment as an estoppel and as *res judicata* as aforesaid. [R. 9, to R. 18.]

An exemplified copy of this judgment was offered in evidence in the present action [R. 36], and, as shown under "Jurisdiction" herein, its admission was refused. [R. 29.]

Basis of Jurisdiction of This Court.

(a) The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(3).

The opinion of the highest state court establishes that petitioner set up and presented, and that court considered, a right claimed under authority of the United States under and by virtue of a judgment of a three-judge United States District Court and that the state court denied such right. [R. 118.] A case which sustains such jurisdiction is *Avery v. Popper*, 179 U. S. 305, 309, 21 S. Ct. 94, 45 L. Ed. 203.

(b) Petitioner has eliminated from this proceeding all question concerning the validity of the statute which is the said California Bank and Corporation Franchise Tax Act, 3 Deering Gen. Laws, page 3010, Act 8488.

(c) The judgment of the said District Court of Appeal was made and entered July 12, 1948. [R. 111.] Petitioner duly petitioned for a hearing in the Supreme Court of the State of California, August 20, 1948. [R. 123.] The Supreme Court of the State of California denied such petition, Sept. 8, 1948. [R. 133.] On Dec. 4, 1948, this court duly extended the time for the filing of a petition for a writ of certiorari herein to Jan. 17, 1949. [R. 138.] On Jan. 3, 1949, this court further duly extended the time for the filing of such petition to and including Jan. 27, 1949. [R. 170.] This petition is being filed after Jan. 3, 1949, and before January 27, 1949.

(d) Petitioner set up in its Answer in the present action a right claimed under authority of the United States under and by virtue of a three-judge United States District Court. [R. 9 to R. 18.] The state court took under advisement the admissibility of such federal judgment with

the understanding that by putting in any evidence that petitioner would not waive its defense of such judgment. [R. 42, 67.] The state court refused admission of such judgment. [R. 29.] The highest state court, to-wit, the District Court of Appeal, considered the question of whether such judgment is *res judicata* as the chief issue in the case. [R. 118.]

(e) The decision of the District Court of Appeal [R. 111], and the said order denying the petition for hearing in the State Supreme Court [R. 133], establish: (1) that there is a final judgment, (2) that such judgment relates to a case in controversy, (3) that such case presents a substantial federal question, (4) that such federal question was properly raised and presented in the state court up to the highest court, and (5) that the decision of the state court does not rest upon a state ground which independently supports the judgment. [R. 111.]

(f) The jurisdiction of the three-judge federal court was invoked under (then) Judicial Code Sec. 24(1)a, b, and c, 28 U. S. C. A. Sec. 41(1)a, b, and c. (Opinion, Append.) The complaint alleged, the Franchise Tax Commissioner stipulated, and the federal court found [R. 139, 141 and 166]; an amount involved in excess of $3,000 [R. 141]; diversity of citizenship [R. 141]; that the California Corporation Bank and Franchise Tax Act (Gen. Laws, Act 8488, Cal.), is unconstitutional in so far as it provides for the mailing of the notices involved in the present action and for the suspension of this petitioners charter based thereon; and that the Franchise Tax Commissioner improperly and wrongfully threatened this petitioner and its agents with a criminal prosecution, in violation of this petitioner's constitutional rights, if it should further attempt to defend the present action. [R. 154.]

Questions Presented.

1. Where the present action is one brought by Charles J. McColgan, as State Franchise Tax Commissioner, in the name of the People of the State of California, against this petitioner as a foreign corporation to collect franchise taxes for certain years on the ground that petitioner did business in California within the meaning of the State Franchise Tax Act, and where the commissioner threatened this petitioner and its agents with criminal prosecution for defending such action and where in a stockholder's action, brought in this petitioner's behalf in a United States District Court against said McColgan, as such commissioner, to enjoin such threatened prosecution, such commissioner stipulated for findings of fact that this petitioner had never done business in California, and that such commissioner had wrongfully assessed the taxes involved in the present action, whether a judgment based upon such stipulation and such findings of fact constitutes an estoppel and a bar as *res judicata* in such present action.

2. Whether a federal court judgment is *res judicata* herein where the Franchise Tax Commissioner, representing the State of California within the limits of his authority, stipulated for such federal judgment adjudicating on the merits the principal issue in the present action.

3. A subordinate question is whether petitioner's defense of *res judicata* is controlling of this case, regardless of the evidence herein, where the trial court took such defense under advisement with the understanding that by putting in evidence petitioner did not thereby waive such defense.

Reason for Granting the Writ.

The District Court of Appeal of the State of California held that the federal court judgment is not *res judicata,* and does not constitute an estoppel, because it is not made in a suit against the State of California, does not purport to enjoin the State of California from levying or collecting a tax, and does not involve the same issues or the same parties.

The decision of this court, on the other hand, in the case of *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381, 402, 403, 60 S. Ct. 907, 84 L. Ed. 1263, relates to a state of facts almost identical to those in the within action in that in each case a governmental agency, within the limits of its authority, undertook to determine, or to consent to a determination of, the status of a corporate taxpayer. In that case this court at page 402 held:

> "The result is clear. Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in Chicago, R. I. & P. R. Co. v. Schendel, 270 U. S. 611, 620, 70 L. Ed. 757, 764, 46 S. Ct. 420, 53 A. L. R. 1265, 26 N. C. C. A. 971, 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same.' A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195. * * *
>
> "The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interest in a final adjudication of the issue in controversy * * * But here

> the authority of the Commission is clear. There can be no question that it was authorized to make the determination of the status of appellant's coal under the Act. It represented the United States in that determination and the delegation of that power to the Commission was valid, as we have said. That suit therefore bound the United States, as well as the appellant. Where a suit binds the United States, it binds its subordinate officials."

The decision of this court in *Charles T. Cromwell v. County of Sac,* 94 U. S. 351, 353, 24 L. Ed. 195, holds that if the judgment in the former case was rendered on the merits, it is an absolute bar to a subsequent action between the parties, or those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. It also holds that where the second action involves a different claim or demand, the judgment in the prior action operates as an estoppel as to all matters in issue upon the determination of which the finding was rendered.

The opinion of the state court [R. 111] and the record herein [R. 139 to R. 169] establish that the Franchise Tax Commissioner, being in fact the same party in the present action and the federal action, consented to a final adjudication on the merits with reference to the status of this petitioner, to-wit, that it is a foreign corporation which is not doing business in the State of California and which is therefore not subject to the jurisdiction of the State Franchise Tax Act, with respect to the particular taxes which are involved in the present action.

The question of law would seem to be important in that a state court, apparently without justification, has disregarded a judgment of a United States court, stipulated to by the State Franchise Tax Commissioner, adjudicating the aforesaid controlling issue, as well as other controlling issues, in the present action.

It would seem that the case of *Stone v. Interstate Natural Gas Company,* 103 F. 2d 544, cited in the opinion of the District Court of Appeal, as well as each of the other cases therein cited, have no relationship to the facts of, or to the principles of law involved in, the present action.

For these reasons it is respectfully submitted that this petition should be granted.

BIRCH SECURITIES COMPANY, a corporation,

By R. R. LANDRUM, Secretary,

Petitioner.

R. S. MCLAUGHLIN,

GEORGE ACRET,

Attorneys for Petitioner.

We hereby certify that the foregoing petition is well founded and not interposed for delay.

R. S. MCLAUGHLIN,

GEORGE ACRET,

Attorneys for Petitioner.

State of California, County of Los Angeles—ss:

R. R. Landrum, being first duly sworn deposes and says that he is secretary of the petitioner corporation named in the foregoing petition, and as such makes this verification in petitioner's behalf; that he has read said petition, knows the contents thereof, and that the same is true of his own knowledge.

R. R. LANDRUM.

Subscribed and sworn to before me this 19th day of January, 1949.

WILLIAM R. LAW,
Notary Public in and for the County of Los Angeles, State of California.

IN THE

Supreme Court of the United States

October Term 1948

No. .....

BIRCH SECURITIES COMPANY,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Court Below.

1. The opinion of the trial court appears at R. 20.

2. The opinion of the District Court of Appeal of the State of California is set forth commencing at R. 111. This opinion appears in 86 Advance California Appellate Reports, 792, and in 196 Pacific 2d 143.

3. The opinion of the three-judge United States District Court in the proceeding in which was entered the judgment which is claimed to constitute an estoppel and *res judicata* herein, appears at 39 Fed. Supp. 358. This opinion is set forth as an Appendix attached to this brief.

Jurisdiction.

The jurisdiction is as set forth in the foregoing petition.

Statement of the Case.

The entire Statement of the Case is included in the Petition under "Statement of the Matter Involved."

Statutes.

Pertinent sections of the California Bank and Corporation Franchise Tax Act, General Laws Act 8488, are Sections 4, 5, 25, 31 and 32. Pertinent provisions of *Section 4* are in subdivision (3) thereof:

> "(3) With the exception of financial corporations, every corporation *doing business within the limits of this State* and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of 4 per centum upon the basis of its net income for the next preceding fiscal or calendar year . . ." (Emphasis added.)

Section 5 defines the term "doing business" as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." * * *

Section 25 provides:

> "As soon as practicable after the return is filed, the commissioner shall examine it and shall determine the correct amount of the tax. If the commissioner

determines that the tax disclosed by the original return is less than the tax disclosed by his examination he shall mail notice to the taxpayer at its post-office address (which must appear on its return) of the additional tax proposed to be assessed against it . . ."

"Within sixty days after the mailing of said notice the taxpayer may file with the commissioner a written protest against the levy of the proposed additional tax, as computed by the commissioner, specifying therein the grounds upon which the protest is based . . ."

"If no such protest is so filed the amount of the tax shall be final upon the expiration of said sixty-day period. * * *"

Section 32 provides:

"(a) If any tax . . . due and payable upon notice and demand from the commissioner, together with penalties and interest thereon, is not paid on or before six o'clock p.m. on the last day of the eleventh month following the due date of such tax . . . if the delinquent taxpayer be a foreign bank or corporation its corporate powers, rights and privileges shall be suspended and shall be incapable of being exercised in this State for any purpose or in any manner.

"(b) The commissioner shall transmit the name of each such bank or corporation to the Secretary of State, and the suspension or forfeiture herein provided for shall thereupon become effective and the certificate of the Secretary of State shall be *prima facie* evidence of such suspension or forfeiture.

"(c) Any person . . . who transacts or attempts to transact any intrastate business in the State in behalf of any such foreign bank or corporation shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than two hundred fifty dollars and not exceeding one thousand dollars, or by imprisonment in the county jail not less than fifty days or more than five hundred days, or by both such fine and imprisonment . . ."

Section 31 provides:

"At any time within three years after the determination of liability for any tax, penalties and interest, or any installment thereof, the commissioner may bring an action in a court of competent jurisdiction in the county of Sacramento *in the name of the people of the State of California to collect the amount delinquent, together with penalties and interest* . . . The Attorney General or the counsel for the commissioner must prosecute such action; and the provisions of the Code of Civil Procedure relating to the service of summons, pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for: . . ." (Emphasis added.)

Section 448 of the Code of Civil Procedure of the State of California provides:

"When the defense to an action is founded upon a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk * * * an affidavit denying the same * * *."

Specification of Errors.

The District Court of Appeal of the State of California erred:

1. In affirming the judgment of the Superior Court of the State of California in and for the County of Sacramento.

2. In affirming such judgment upon the authority of *Stone v. Interstate Natural Gas Co.*, 103 F. 2d 544, and the other cases cited in such courts' opinion in that such cases are based upon different facts and do not involve the question herein presented.

3. In failing to follow the clear and unambiguous ruling of this court in the case of *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 380, 402, 403, 60 S. Ct. 907, 84 L. Ed. 1263, which holds that "the crucial point is whether or not in the early litigation the representative of the United States had authority to represent its interest in a final adjudication of the issue in controversy." (To-wit, with respect to the status of the corporation within the meaning of the Guffey Coal Act.)

4. In failing to observe that Section 31 of the Franchise Tax Act authorized and required the commissioner to bring the present action in the name of the People of the State of California and that Section 25 of such Act authorized the commissioner to determine the status of this corporation within the meaning of such Act and that in determining and consenting to a determination of such status in the present action and in the federal action he acted as a representative of the State of California within the limits of his authority and that the federal suit therefore bound the State of California under the principle of estoppel and *res judicata*.

ARGUMENT.

POINT I.

The Federal Judgment Is Res Judicata Herein Because the Franchise Tax Commissioner, Representing the State of California in That Action Within the Limits of His Authority, Stipulated for an Adjudication Therein on the Merits of the Principal Issue in the Present Action.

As appears from the Statement of the Matter Involved in the petition, Charles J. McColgan, as Franchise Tax Commissioner, brought the present action in the name of the People of the State of California, to collect additional franchise taxes for the years 1935 and 1936 from this petitioner on the ground that this petitioner was doing business in California during such years within the meaning of the said State Franchise Tax Act and that in the federal court action the said Charles J. McColgan, as such Franchise Tax Commissioner, determined and stipulated for an adjudication *on the merits* that during such years this petitioner was not doing business in the State of California within the meaning of such Act.

It would seem that there can be no question but that the present action is one in fact brought by the said Charles J. McColgan as Franchise Tax Commissioner. Section 31 of the Franchise Tax Act, hereinabove quoted, expressly provides that he shall bring an action to collect such a tax "in the name of the People of the State of California."

It would seem also that there can be no question but that in making a determination of this petitioner's status as to whether or not it was a corporation doing business in California within the meaning of such Act, and as to whether or not it was therefore liable for a tax, the Commissioner was acting as a representative of the state of

California in the federal action, within the limits of his authority for the reason that Section 4(3) of the said Franchise Tax Act provides that corporations doing business within the state shall be liable for a tax and in that Section 5 defines doing business, and in that Section 25, all hereinabove quoted, authorizes the commissioner to make determination of a corporation's liability for such tax.

It would therefore seem that the commissioner determined and consented to a final adjudication on the merits in the federal court action, *after the filing of the federal court opinion* (Appendix A hereof) of the principal issue in the present action, to-wit, the status of this petitioner as to the fact that it is not doing business in the State of California within the meaning of the State Franchise Tax Act.

It would seem that the facts are therefore identical with the facts in the case of *Sunshine Anthracite Coal Company v. Adkins, supra*, in so far as they bring into operation the principles of law therein stated, and as hereinbefore quoted in the petition under Reason for Granting the Writ.

The decision of the state court is also in conflict with the opinion of this court in *Charles T. Cromwell v. County of Sac, supra*. In that case this court held that a judgment in a former case, rendered *on the merits, is an absolute bar,* to a subsequent action between the parties, or those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

It will appear from the record herein that there was a conflict in the evidence in the present action as to whether

this petitioner did business in California. [R. 45.] The court, however, heard evidence on the merits, with the express understanding that this petitioner did not waive its defense of the prior judgment. [R. 42.] Under the holding in the *Cromwell* case, *supra*, the judgment in the federal case was an absolute bar upon the question of whether this petitioner did business in California, *regardless of the evidence in the present action.*

It would therefore seem that the state court opinion upon the question of *res judicata* is directly in conflict with both the *Sunshine Anthracite Coal Co.* case, *supra,* and the *Cromwell* case, *supra,* and that the state court's disregard of such cases and of such federal judgment involves a question of importance.

POINT II.

The Federal Judgment Estops Respondent From Asserting Here That Petitioner Ever Has Done Business in California, or That the Tax Involved Here Was Validly Levied.

As heretofore pointed out under Statement of the Matter Involved the present action is based upon the alleged fact that petitioner did business in California during certain years and that the Franchise Tax Commissioner stipulated for a final judgment enjoining the suspension of this petitioner's charter based upon the fact that this petitioner did not do business in California during such years and that the tax involved in the present action was "wrongfully" imposed. [R. 139, 145, 149, and 166.]

Notwithstanding the aforesaid estoppel the state court determined in the present action that this petitioner did do business in California during such period within the

meaning of such Franchise Tax Act. [R. 26.] Without this finding of fact the respondent in the present action could not have prevailed.

As held in the *Cromwell* case, *supra,* even where a second action involves a different claim or demand, the judgment in the prior action operates as an estoppel as to all matters in issue upon the determination of which the finding was rendered.

It would seem that the opinion of the state court is in conflict with the *Cromwell* case, *supra,* also upon the question of estoppel and that the state court's disregard of such estoppel also involves a question of importance.

Respectfully submitted,

R. S. McLaughlin,

George Acret,

Attorneys for Petitioner.

Opinion.

Birch v. McColgan, Franchise Tax Commissioner of California, *et al.* No. 1430-B.

District Court, S. D. California, Central Division.

June 9, 1941.

Action by A. Otis Birch against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, and others for injunction against enforcement of tax statute by state officers and against compliance with such statute by corporate officers and directors. On motion to dismiss.

Order in accordance with opinion.

George Acret, of Los Angeles, Cal., for plaintiff.

Earl Warren, Atty. Gen., and H. H. Linney, and Valentine Brookes, Deputy Attys. Gen., for defendant State officers.

No appearance for other defendants.

Before Mathews, Circuit Judge, and Hollzer and Beaumont, District Judges.

MATHEWS, Circuit Judge.

This is an action by A. Otis Birch against nine State officers of California, namely, Charles J. McColgan, Franchise Tax Commissioner, Paul Peek, Secretary of State, Earl Warren, Attorney General, George R. Reilly, Fred E. Stewart, R. E. Collins, William G. Bonelli and Harry B. Riley, members of the State Board of Equalization, and John F. Dockweiler, District Attorney of Los Angeles County; and against four other defendants, namely, Birch Securities Company, a Nevada corporation, Birch Holding Company, a Delaware corporation, M. Estelle C. Birch and R. R. Landrum. The complaint

prays for interlocutory and permanent injunctions restraining the State officers from enforcing against Birch Securities Company the California Bank and Corporation Franchise Tax Act[1] (General Laws, and Supp. 1939, Act 8488), on the ground that the Act is unconstitutional; and, on the same ground, restraining Birch Securities Company, its officers and directors, from complying with the Act or submitting to its enforcement. The State officers have moved to dismiss the action for lack of jurisdiction and for failure to state a claim for which relief can be granted.[2] The application for an interlocutory injunction and the motion to dismiss the action have been heard and are now to be determined by this court, constituted as provided in Sec. 266 of the Judicial Code, 28 U. S. C. A., Sec. 380.

Pertinent sections of the California Bank and Corporation Franchise Tax Act are Sections 4, 5, 11, 13, 25, 27, 30, 31 and 32. Pertinent provisions of Sec. 4 are in subdivision (3), and (4) and (5) thereof:

"(3) With the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate

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[1]Stats. 1929, p. 19, as amended by Stats. 1929, p. 1555; Stats. 1931, pp. 60, 64, 2225; Stats. 1933, pp. 40, 687, 692, 869; Stats. 1935, pp. 959, 995, 1245; Stats. 1937, pp. 85, 2324; Stats. 1939, p. 2934.

[2]Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723c, Rule 12(b).

of 4 per centum upon the basis of its net income for the next preceding fiscal or calendar year * * *

"(4) Any corporation organized to hold the stock or bonds of any other corporation or corporations, and not trading in such stock or bonds or other securities held, and engaging in no other activities than the receipt, and disbursement of dividends from such stock or interest from such bonds, shall not be considered a corporation doing business in this State for the purposes of this act.

"(5) Every corporation not otherwise taxed in pursuance of this section and not expressly exempted by the provisions of this act or the Constitution of this State shall pay annually to the State a tax of twenty-five dollars."

Section 5 defines the term "doing business" as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." Section 11 defines the term "income year" as the "calendar year, or the fiscal year ending during such calendar year, upon the basis of which the [taxpayer's] net income is computed," and defines the term "fiscal year" as "an accounting period of twelve months or less ending on the last day of any month other than December."

Section 13 provides: "Every bank and corporation subject to the tax imposed by this act shall, within two months and fifteen days after the close of its income year, transmit to the [franchise tax] commissioner a return in a form prescribed by him, specifying, for the income year, all such facts as he may by rule, or otherwise, require in order to carry out the provisions of this act."

Section 25 provides:

"As soon as practicable after the return is filed, the commissioner shall examine it and shall determine the correct amount of the tax. If the commissioner determines that the tax disclosed by the original return is less than the tax disclosed by his examination he shall mail notice to the taxpayer at its post-office address (which must appear on its return) of the additional tax proposed to be assessed against it * * *

"Within sixty days after the mailing of said notice the taxpayer may file with the commissioner a written protest against the levy of the proposed additional tax, as computed by the commissioner, specifying therein the grounds upon which the protest is based * * *

"If no such protest is so filed the amount of the tax shall be final upon the expiration of said sixty-day period. If a protest is so filed it shall be the duty of the commissioner to reconsider the computation and levy of the tax complained of, and if the taxpayer has so requested in its protest, it shall be the duty of the commissioner to grant said taxpayer, or its authorized representatives, an oral hearing. After consideration of the protest and the evidence adduced in the event of such oral hearing, the commissioner's action upon the protest shall be final upon the expiration of thirty days from the date when he mails to the taxpayer notice of his action, unless within that thirty-day period the taxpayer appeals in writing from the action of the commissioner to the State Board of Equalization * * *

"When a deficiency has been determined and the tax has become final under the provisions of this section, the commissioner shall mail notice and demand to the taxpayer for the payment thereof, and such tax shall be

due and payable at the expiration of ten days from the date of such notice and demand.

"A certificate by the commissioner or of said board, as the case may be, of the mailing of the notices specified in this section shall be prima facie evidence of the computation and levy of the deficiency in tax and of the giving of said notices."

Section 27 provides: "If, in the opinion of the commissioner, or the State Board of Equalization, as the case may be, there has been an overpayment of tax, penalty or interest by a taxpayer for any year for any reason, the amount of such overpayment shall be credited against any taxes then due from the taxpayer under this act, and the balance shall be refunded to the taxpayer * * * No such credit or refund shall be allowed or made after four years from the last day prescribed for filing the return or after one year from the date of the overpayment, whichever period expires the later, unless before the expiration of such period a claim therefor is filed by the taxpayer * * *"

Section 30 provides:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State, or against any officer thereof to prevent or enjoin the assessment or collection of any tax under this act but any taxpayer claiming that the tax computed and levied against it pursuant to section 25 of this act is void in whole or in part may bring an action against the commissioner for the recovery of the whole or any part of the amount paid. Such action must be filed within four years from the last day prescribed for filing the return or within one year from the date the tax was paid, whichever period expires

the later; provided, that no action shall be filed for the recovery of a deficiency assessment unless the taxpayer has made protest to the commissioner of the computation and levy complained of under the provisions of section 25 hereof.

"Within ninety days after the mailing of the notice of the commissioner's action upon any refund claim, or in case of an appeal to the State Board of Equalization from the disallowance of any refund claim, within ninety days after the mailing of the notice of the board's determination of the appeal, the taxpayer may bring an action against the commissioner on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment."

Section 31 provides:

"At any time within three years after the determination of liability for any tax, penalties and interest, or any installment thereof, the commissioner may bring an action in a court of competent jurisdiction in the county of Sacramento in the name of the people of the State of California to collect the amount delinquent, together with penalties and interest * * * The Attorney General or the counsel for the commissioner must prosecute such action; and the provisions of the Code of Civil Procedure relating to the service of summons, pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for: * * *

"At any time within which an action can be brought to collect any delinquent amounts as provided in the preceding paragraph, the commissioner may collect the tax, together with penalties and interest in the following manner: The commissioner shall seize any personal property owned by the bank or corporation against whom the

tax is assessed, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the tax due hereunder, together with any interest, and any penalty or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale * * *"

Section 32 provides:

"(a) If any tax * * * due and payable upon notice and demand from the commissioner, together with penalties and interest thereon, is not paid on or before six o'clock p. m. on the last day of the eleventh month following the due date of such tax * * * if the delinquent taxpayer be a foreign bank or corporation its corporate powers, rights and privileges shall be suspended and shall be incapable of being exercised in this State for any purpose or in any manner.

"(b) The commissioner shall transmit the name of each such bank or corporation to the Secretary of State, and the suspension or forfeiture herein provided for shall thereupon become effective and the certificate of the Secretary of State shall be prima facie evidence of such suspension or forfeiture.

"(c) Any person * * * who transacts or attempts to transact any intrastate business in the State in behalf of any such foreign bank or corporation shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than two hundred fifty dollars and not exceeding one thousand dollars, or by imprisonment in the county jail not less than fifty days or more than five hundred days, or by both such fine and imprisonment * * *

"(d) Every contract made in violation of this section is hereby declared to be voidable, at the instance of any party other than the taxpayer."

Plaintiff's application for an interlocutory injunction was made in and by his complaint, which is verified. The defendant State officers have filed an answer denying some of the allegations of the complaint, but their answer is not verified. The other defendants have not appeared. No evidence has been submitted by any of the defendants. For present purposes, therefore, the allegations of the complaint are taken as true. The facts there alleged are substantially as follows:

Plaintiff is and was at all pertinent times the owner and holder of 49% of the capital stock of Birch Holding Company, which is and was at all pertinent times the owner and holder of all the capital stock of Birch Securities Company. M. Estelle C. Birch and R. R. Landrum are and were at all pertinent times the owners and holders of 51% of the capital stock of Birch Holding Company. They and plaintiff together constitute, and did at all pertinent times constitute, the board of directors of Birch Holding Company and the board of directors of Birch Securities Company. They and plaintiff are and were at all pertinent times officers of both companies, plaintiff being president, M. Estelle C. Birch vice president and Landrum secretary of each company.

Birch Securities Company (hereafter called the Company) is not and never was a financial corporation. It is not and never was actively engaged in any transaction for the purpose of financial or pecuniary gain or profit. It is and was at all pertinent times a corporation organized to hold the stock or bonds of other corporations. It has never traded in such stock or bonds or other securi-

ties held, nor has it engaged in any activity other than the receipt and disbursement of dividends from such stock or interest from such bonds. Therefore, although it has an office in California, it is not and never was a corporation doing business in California, within the meaning of Sec. 4, *supra*.[3]

On or about December 10, 1935, the Company transmitted to the Franchise Tax Commissioner, pursuant to Sec. 13, *supra*, a return specifying, for its income year ended September 30, 1935, all facts required by the Commissioner, and paid for that year the tax disclosed by the return, namely, the minimum tax of $25 prescribed in Sec. 4. On or about December 10, 1936, it made a similar return and paid a similar tax for its income year ended September 30, 1936. As the Company never did business in California, the minimum tax so paid by it was, for each of said years, the only tax for which it was liable. Hence the Commissioner could not lawfully assess or propose to assess any additional tax against the Company[4] for either of said years. It is presumed, therefore, that no such assessment was made or proposed. This presumption is strengthened by the fact—which the complaint expressly alleges—that no notice of any such proposed assessment was received by the Company.

On or about April 1, 1938, the Commissioner, under color of Sec. 32, *supra*, transmitted the Company's name to the Secretary of State and stated to the Secretary that, with respect to its income years ended September

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[3]This and other conclusions stated in the opinion are based on the assumption that the allegations of the complaint are true. Both the assumption and the conclusions are for present purposes only. Both, on final hearing, may prove unwarranted.

[4]Section 25, *supra*.

30, 1935, and September 30, 1936, the Company was a delinquent taxpayer—which was untrue. Because of that untrue statement, and for no other reason, the Secretary issued a certificate stating that the Company's corporate powers, rights and privileges[5] were suspended and forfeited. There was in fact no such suspension or forfeiture; for, under Sec. 32, suspension or forfeiture occurs[6] only where there is actual delinquency, and in this case there was none.

On August 23, 1938, the Commissioner, under color of Sec. 31, *supra*, brought an action (No. 58345) in the Superior Court of Sacramento County in the name of the people of the State of California to collect of the Company a tax of $6,336.14 for its income year ended September 30, 1935, and a tax of $1,137.63 for its income year ended September 30, 1936, a total of $7,473.77, with interest and costs. Said action No. 58345 was at all times and is now being prosecuted by the Attorney General.

To the complaint in said action No. 58345, the Company filed an answer and an amended answer. Said complaint falsely alleges[7] that the Company is and was at all times therein mentioned a corporation doing business in California; that, by reason thereof, it became and is liable for the taxes sought to be collected in said action;

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[5]In the complaint, the Company's corporate powers, rights and privileges are spoken of as its "charter."

[6]Under Sec. 32, suspension or forfeiture occurs, if at all, by operation of law, not by any acts of the Secretary of State. The Secretary merely issues a certificate evidencing such suspension or forfeiture, and his certificate is *prima facie* evidence only.

[7]Since the allegations of the complaint in No. 58345 are contrary to and inconsistent with those of the complaint in the action here pending, and since the latter are, for present purposes, presumed to be true, the former are, for present purposes, presumed to be false.

and that said taxes are now due and owing. The amended answer denies these allegations, states that no tax is due or owing by the Company, and prays that said action be dismissed.

On or about January 14, 1941, the Attorney General filed in said action No. 58345, a motion to strike the amended answer on the ground that, because of the suspension and forfeiture purportedly evidenced by the aforesaid certificate of the Secretary of State, the Company was not entitled to defend said action.[8] By letters dated January 14, 1941, and January 30, 1941, the Attorney General warned the Company's attorney that any appearance on the Company's behalf by its attorney or any of its officers "might constitute a misdemeanor"[9]—a warning which was, in effect, a threat.

The Attorney General's letters having come to the attention of M. Estelle C. Birch and R. R. Landrum, they informed plaintiff that, because they feared prosecution under Sec. 32, *supra*, they desired plaintiff (the Company's president) and the Company to desist from any activity which might subject them to such prosecution and from all activities in connection with the defense of said action No. 58345. Plaintiff thereupon demanded of the Company and its Board of Directors—consisting of himself, M. Estele C. Birch and R. R. Landrum—that the Company defend and continue to defend said action No. 58345; that it file in said action a second amended answer challenging the constitutionality of the California Bank and Corporation Franchise Tax Act; "and/or that

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[8]Boyle v. Lakeview Creamery Co., 9 Cal. (2d) 16, 68 P. 2d 968; Ocean Park Bath House & Amusement Co. v. Pacific Auto Park Co., 37 Cal. App. (2d) 158, 98 P. 2d 1068.

[9]Section 32, *supra*.

it apply to any other court of competent jurisdiction in order to test the constitutionality of the Act."

At a meeting held on February 18, 1941, the board considered plaintiff's demand and, by a vote of two to one,[10] refused to comply with it, resolving instead that the Company should "engage in no activities whatsoever" —all because a majority of the Board[11] feared prosecution under Sec. 32. Plaintiff made a similar demand on the Company's sole stockholder (Birch Holding Company) and its board of directors,[12] with a similar result. Thereafter, on February 27, 1941, this action was commenced.

The complaint alleges that the California Bank and Corporation Franchise Tax Act is unconstitutional in that it attempts to deprive the Company of its property without due process of law and thus violates the Fourteenth Amendment. On that ground, among others, the complaint prays for interlocutory and permanent injunctions (1) restraining the defendant State officers (a) from assessing against or collecting from the Company any tax imposed by the Act; (b) from maintaining or attempting to maintain any suspension or forfeiture of the Company's corporate powers, rights or privileges, and (c) from commencing or maintaining against the Company or any officer, director or agent of the Company any prosecution for or on account of the exercise of such powers, rights or privileges; and (2) restraining the Company its officers and directors from complying with the Act or submitting to its enforcement. The complaint fur-

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[10]M. Estelle C. Birch and R. R. Landrum voted for, and plaintiff against, the resolution refusing compliance with plaintiff's demand.

[11]M. Estelle C. Birch and R. R. Landrum.

[12]M. Estelle C. Birch, R. R. Landrum and plaintiff.

ther prays that, by our final judgment, the Act be declared unconstitutional, and that the purported suspension and forfeiture hereinabove referred to be declared void and of no effect.

It does not appear that the defendant State officers are now assessing or attempting to assess, or intend to assess, any tax against the Company. There is, therefore, no present reason for enjoining such assessment. It does not appear that said officers are now collecting or attempting to collect, or intend to collect, any tax from the Company other than those claimed to be due and owing for the years ended September 30, 1935, and September 30, 1936. There is, therefore, no present reason from enjoining the collection of any other tax. It does not appear that said officers are now collecting or attempting to collect, or intend to collect, any tax from the Company for the years ended September 30, 1935, and September 30, 1936, otherwise than by said action No. 58345. There is, therefore, no present reason for enjoining collection by other means.[13]

It does appear that, by said action No. 58345, said officers were, at the time this action was commenced, and are now, attempting to collect taxes from the Company for the years ended September 30, 1935, and September 30, 1936. Hence an injunction restraining such collection would constitute a stay of proceedings in a State court—a stay which, not being authorized by any law relating to proceedings in bankruptcy, is prohibited by Sec. 265 of the Judicial Code, 28 U. S. C. A., Sec. 379.[14]

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[13]See second paragraph of Sec. 31, *supra*.

[14]"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Hull v.Burr, 234 U. S. 712, 722-725, 34 S. Ct. 892, L. Ed. 1557; Essanay Film Mfg. Co. v. Kane, 258 U. S. 358, 360-362, 42 S. Ct. 318, 66 L. Ed. 658; Kline v. Burke Construction Co. 260 U. S. 226, 228-235, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077; Lion Bonding & Security Co. v. Karatz, 262 U. S. 77, 88-90, 43 S. Ct. 480, 67 L. Ed. 871; Riehle v. Margolies, 279 U. S. 218, 223, 49 S. Ct. 310, 73 L. Ed. 669; Monamotor Oil Co. v. Johnson, 292 U. S. 86, 97, 54 S. Ct. 575, 78 L. Ed. 1141; Hill v. Martin, 296 U. S. 393, 403, 56 S. Ct. 278, 80 L. Ed. 293; Kohn v. Central Distributing Co., 306 U. S. 531, 534, 59 S. Ct. 689, 83 L. Ed. 965; Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 8, 60 S. Ct. 215, 84 L. Ed. 537.

The prayer for an interlocutory injunction restraining the assessment and collection of taxes under the California Bank and Corporation Franchise Tax Act is accordingly denied.

It does not follow, however, that the action should be dismissed; for this is not merely an action to enjoin the assessment and collection of taxes. It is also an action to enjoin the wrongful acts which, according to the Complaint, the State officers are committing and threatening to commit under color of Sec. 32, *supra*. It appears from the complaint that, under color of Sec. 32, said officers are asserting and threatening to enforce a purported—but non-existent—suspension and forfeiture of the Company's corporate powers, rights and privileges and are threatening to prosecute the Company's officers, directors and agents if they, in its behalf, exercise or attempt to exercise any of said powers, rights or privileges, even to the extent of defending or attempting to defend said action No. 58345. It further appears that the threatened acts will, if not enjoined, preclude any such defense, and

that, lacking such defense, the Company will be deprived of its property—$7,473.77, with interest and costs—without due process of law.

Thus the action is one of a civil nature in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and arises under the Constitution of the United States. It is not an action to enjoin, suspend or restrain the enforcement, operation or execution of any order of an administrative board, commission or rate-making body, or to enjoin, suspend or restrain any action in compliance with any such order. Nor is it merely an action to enjoin, suspend or restrain the assessment, levy or collection of a tax. Clearly, therefore, this court has jurisdiction. Judicial Code, Sec. 24(1),[15] 28 U. S. C. A., Sec. 41(1).

We next consider whether the wrongful acts which, according to the complaint, the State officers are committing and threatening to commit under color of Sec. 32 should be enjoined. The application for such an in-

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[15]Section 24 provides:

"The district courts shall have original jurisdiction as follows:

"(1) Of all suits of a civil nature, at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States . . . Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcements, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where (certain conditions exist). Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

junction is opposed on the ground that the Company has an adequate remedy in the State courts. This contention—coming from an Attorney General who, according to the complaint, is threatening to prosecute any officer, director or agent of the Company who may, in its behalf, make any appearance in a State court—cannot be taken seriously. A "remedy" the invocation of which entails such consequences is no remedy at all.

It is no answer to say that the Company could, by paying the disputed taxes, obtain a "revivor" of its corporate powers, rights and privileges;[16] for it appears from the complaint that, in order to obtain money for that purpose, the Company would have to transact intrastate business in California, which, of course, it could only do through officers, directors, or agents acting in its behalf. Any such transaction would constitute what the State officers contend is a misdemeanor, and would undoubtedly be prosecuted under Sec. 32.

The State officers invoke the "familiar rule that courts of equity do not ordinarily restrain criminal prosecutions."[17] That rule, however, has its exceptions. Such an exception exists where threatened prosecutions will, if not restrained, cause irreparable loss through the taking of property without due process of law. Ex parte Young, 209 U. S. 123, 161-168, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A., N. S. 932, 14 Ann. Cas. 764; Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340, 349, 33 S. Ct. 961, 57 L. Ed. 1507; Truax v. Raich, 239 U. S. 33, 37-39, 36 S. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas.

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[16]Such "revivors" are provided for in Sec. 33 of the California Bank and Corporate Franchise Tax Act.

[17]Beal v. Missouri Pacific R. Corp., 312 U. S. 45, 49, 61 S. Ct. 418, 420, 85 L. Ed. .....

1917B, 283; Terrace v. Thompson, 263 U. S. 197, 214-216, 44 S. Ct. 15, 68 L. Ed. 255; Packard v. Banton, 264 U. S. 140, 143, 44 S. Ct. 257, 68 L. Ed. 596; Cline v. Frink Dairy Co., 274 U. S. 445, 451-452, 47 S. Ct. 681, 71 L. Ed. 1146; Gibbs v. Buck, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 1111. The allegations of the complaint—here assumed to be true—bring this case within that exception.

In the circumstances here disclosed, refusal by the Company's directors to defend said action No. 58345 or to bring an action in the Company's name in a State court of California was excusable. Not so their refusal to bring an action in this court; for, although they feared and were justified in fearing that any appearance by or for the Company in a State court action would subject them to prosecution, there was no ground for any such fear with respect to an action brought in this court. The Company's interests clearly required that such an action be brought. Refusal to bring it constituted a breach of trust, which warranted the bringing of a stockholder's action. Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 318-323, 56 S. Ct. 466, 80 L. Ed. 688.[18]

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[18]See, also, Dodge v. Woolsey, 18 How. 331, 340-346, 15 L. Ed. 401; Greenwood v. Union Freight R. Co., 105 U. S. 13, 16, 26 L. Ed. 961; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 553-554, 15 S. Ct. 673, 39 L. Ed. 759; Smyth v. Ames, 169 U. S. 466, 515-518, 18 S. Ct. 418, 42 L. Ed. 819; Cotting v. Kansas City Stock Yords Co., 183 U. S. 79, 112-113, 22 S. Ct. 30, 46 L. Ed. 92; Doctor v. Harrington, 196 U. S. 579, 587, 589, 25 S. Ct. 355, 49 L. Ed. 606; Delaware & Hudson Co. v. Albany & Susquehanna R. Co., 213 U. S. 435, 445-453, 29 S. Ct. 540, 53 L. Ed. 862; Brushaber v. Union Pacific R. Co., 240 U. S. 1, 9, 10, 36 S. Ct. 236, 60 L. Ed. 493, L. R. A. 1917D, 414, Ann. Cas. 1917B, 713; Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 200-202, 41 S. Ct. 243, 65 L. Ed. 577; Hill v. Wallace, 259 U. S. 44, 60-62, 42 S. Ct. 453, 66 L. Ed. 822; Carter v. Carter Coal Co., 298 U. S. 238, 286, 287, 56 S. Ct. 855, 80 L. Ed. 1160.

This action, brought by plaintiff, is a stockholder's action; for, although plaintiff is not a stockholder of the corporation (Birch Securities Company) in whose behalf the action is brought, he is a stockholder of that corporation's sole stockholder (Birch Holding Company). The Holding Company and its directors having refused to act, plaintiff was and is entitled to maintain this action in behalf of the Securities Company. Piccard v. Sperry Corp., D. C., S. D. N. Y., 30 Fed. Supp. 171, 173.

We conclude that the State officers' motion to dismiss the complaint should be denied, and that an interlocutory injunction should issue, restraining said officers from maintaining, enforcing, giving effect to, or attempting to maintain, enforce or give effect to, any suspension or forfeiture or purported suspension or forfeiture of the corporate powers, rights or privileges of Birch Securities Company; from prosecuting or threatening to prosecute any officer, director or agent of said Company for or on account of any exercise of said powers, rights or privileges; and from in any manner preventing or attempting to prevent said Company from commencing, maintaining or defending any action in any court of the State of California.

Such an injunction will dispel the fears which have caused the Company's officers and directors to refrain from defending said action No. 58345 or transacting other business in its behalf. We assume that, being freed from such fears, the Company's officers and directors will do their duty, and that no injunction against them or the Company will be necessary. The prayer for an interlocutory injunction against the Company, its officers and directors is accordingly denied, without prejudice.

An order will be entered in accordance with this opinion.